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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARCO ANTONIO VILLAGRAN, Defendant and Appellant.	E059844 (Super.Ct.No. FVA1200024) OPINION

APPEAL from the Superior Court of San Bernardino County. Ingrid Adamson Uhler, Judge. Affirmed.

Charles R. Khoury, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Kelley Johnson, Ryan H. Peeck and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Marco Antonio Villagran of making criminal threats. (Pen. Code, § 422, subd. (a).)[1] However, the jury could not reach a unanimous verdict on a count for inflicting battery on a spouse (§ 273.5, subd. (a)), causing the trial court to declare a mistrial on this count and then to dismiss it in the interests of justice (§ 1385). The jury found true the allegation that defendant had been convicted of shooting at an inhabited dwelling (§ 246) in 2008, and that he had served a prison term for that offense but failed to remain free of felony convictions for five years after his release. (§§ 667, subd. (a)(1), 667.5, subd. (b).) The trial court sentenced defendant to a total of 11 years in state prison. This was comprised of the upper term of three years, doubled under the three strikes law, with a five-year enhancement for the prior serious felony. (§§ 1170.12, subd. (c)(1), 667, subd. (a)(1).)

On appeal,[2] defendant contends that the conviction for making criminal threats is not supported by substantial evidence of all essential elements of the crime. He also argues the trial court erred by failing to give the jury a sua sponte instruction on the lesser included offense of attempting to make criminal threats. We disagree with both premises and affirm the judgment.

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[1] Unless otherwise specified, all statutory references are to the Penal Code.

[2] Defendant filed a petition for writ of habeas corpus on a separate issue (case No. E062519). We ordered the habeas corpus petition considered with this appeal. We will resolve that petition by separate order.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the events leading to defendant's conviction, defendant and the victim had been legally married to each other for approximately 30 years. However, they had been separated for five to 10 years. One of the daughters of defendant and the victim lived with the victim and testified at trial. She indicated she had allowed defendant to move back into the victim's residence because he had nowhere else to live. Defendant, who suffers from cirrhosis, has trouble walking and often uses a cane. At the time of the incidents at issue in this appeal, though, he "could just walk" without assistance. The victim testified that, when defendant was drinking, "Sometimes he would be loveable and sometimes he would be not loveable."

The relationship between defendant and the victim has been stormy. They argued "often," and those arguments sometimes became physical. The victim recalled a domestic violence prosecution against defendant in 2001. She had to take him to classes because he had to enroll in a domestic violence program. However, the victim denied remembering any details about the incident "because there were many instances when stuff like this happened." In addition, in 2008 defendant discharged a firearm at the victim's house.[3] The victim admitted that, over the course of her marriage, she had attacked defendant with a variety of objects, including a knife. Although some years were better than others, she estimated fights occurred, "Probably several times a week."

[3] Because this incident is relevant to certain elements of the criminal threats charge, we discuss it in more detail later.

The victim testified both at the preliminary hearing and at trial. Before beginning to answer questions at trial, the victim told the judge she was a 12 out of 10 on the nervousness scale. In fact, the court allowed her to testify while wearing sunglasses. The victim stated she and the defendant were on "friendly terms" by the time of trial. She also admitted she still had feelings for him, as he is the father of her daughters. These feelings made it difficult for the victim to testify, as evidenced by her expressed inability to recall major events relevant to the prosecution. Beginning on August 31, 2012, the victim had visited defendant in jail as many as three times a month. When asked if these visits were why the victim seemed to have difficulty remembering events relevant to the charges against defendant, she responded, "Not only because I visited him, but because I choose not to remember certain things"

The victim's discomfort and apparent memory deficits led the trial court to deem her a witness hostile to the prosecution. Because the victim's testimony at trial was inconsistent with her testimony at the preliminary hearing, the trial court also allowed the transcript from the preliminary hearing to be admitted as an exhibit. Because the jury had before it this transcript and all the testimony that was taken at trial, we cull the facts we recite below from either or both of these sources and note inconsistencies in the victim's testimony only where they are relevant to this appeal.

As relevant to this appeal, the events underlying defendant's prosecution are as follows: On December 28, 2011, defendant and the victim became involved in a physical altercation in the victim's residence. By the time of trial, neither the victim nor the

daughter who testified at trial appeared to know what caused the fight. Defendant had been drinking at the time. When the argument broke out, defendant and the victim's two daughters were present. Defendant hit the victim in the face, causing her to bleed. She testified at trial she had probably raised her hands during the fight. The daughter who testified at trial called the police because the blood "caused [her] alarm." Defendant left the residence on foot. As he was walking away, he called the daughter who called the police a "rat" or something to that effect because she had called the police.

An officer responded to the scene, and the victim made a report. She visited the emergency room, where it was determined she had a broken nose.

On the day after this incident, the victim received a call from a male who asked if the police were looking for him. The victim testified unequivocally at the preliminary hearing that she recognized defendant's voice. She testified to the same effect at trial. Although the victim at one point indicated she was "not positive" who the caller was, she later admitted she knew of no other male who would have asked her if the police were looking for him. Defendant began by asking the victim if the police were looking for him. He told the victim she was "dead to" him and said, "Don't be surprised if something happens to you or if your cars blow up." The call "put [the victim] in fear" and made her feel "scared." The victim or someone close to her called the police, who came to the residence and took a statement. At the time, defendant had not yet been apprehended. As a safety measure, the victim either had someone come to stay with her

or left her residence to stay with family. Either way, the precaution lasted until defendant's arrest.

Six days after the argument, a police officer located defendant and arrested him. He had no apparent injuries at the time.

At the preliminary hearing, the victim admitted she was afraid for her safety after the phone call from defendant. She also indicated defendant had been violent with her in the past. When asked what he had done in the past, she immediately volunteered: "Uhm, well, he shot our house up."

The incident to which she referred occurred in 2008, when defendant got into an argument with his son-in-law at the victim's house. Defendant had been drinking. He retrieved an object that appeared to be a gun from his back pocket and pointed it at the son-in-law. The victim told an investigating police officer defendant had fired two to three shots at his son-in-law. Even at trial in this action, the victim admitted she was afraid based on defendant's conduct in the 2008 shooting incident. However, she also specifically denied at trial that defendant's prior violence, including the 2008 shooting at the victim's residence, contributed to her fear after the phone call on December 29, 2011. Still, she admitted that she had testified as described *ante* at the preliminary hearing. To the victim's recollection, defendant did not strike or threaten her on the night of the 2008 shooting. Police were dispatched to the scene of the 2008 shooting and took a report. One of the investigating officers attended the preliminary hearing in the prosecution that

resulted from the shooting. He testified in the trial in this prosecution that even then the victim minimized what had happened.

As we indicated *ante*, the jury was unable to reach a unanimous verdict on the spousal battery count. Before the trial court declared a partial mistrial on this ground, it received a request from the jury regarding self-defense instructions. The instructions the jury received on the spousal battery count indicated the People had to prove defendant did not act in self-defense. The jury received a separate instruction indicating self-defense would be a complete defense to the spousal battery count if substantiated.

ANALYSIS

In the first section *post*, we address defendant's argument that the People failed to present substantial evidence of nearly all elements of a violation of section 422. The remaining section rejects defendant's contention that the trial court erred in failing to instruct the jury on attempted criminal threats.

1. *Substantial evidence supports the judgment*

In this appeal, defendant challenges the sufficiency of the evidence presented in support of all but the one of the elements of a conviction for criminal threats. For clarity, we address his specific contentions under separate headings below.

"In order to prove a violation of section 422, the prosecution must establish all of the following: (1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if

there is no intent of actually carrying it out,' (3) that the threat—which may be 'made verbally, in writing, or by means of an electronic communication device'—was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227-228 (*Toledo*).)

At oral argument, defendant's counsel asked us to consider *Elonis v. United States* (2015) ___ U.S. ___ [135 S.Ct. 2001] (*Elonis*), in which the United States Supreme Court held that title 18 United States Code section 875, the federal counterpart to Penal Code section 422, requires proof that the defendant had a criminal intent greater than negligence. Counsel claimed that this is not the law in California but expressed the view that it should be. Our answer is simple: California law *already* requires proof that the defendant intended to make a threat. Penal Code section 422 allows the conviction only of a person who "willfully threatens to commit a crime which will result in death or great bodily injury," and cases interpreting this provision list intent to threaten as an essential element of the offense. (See, e.g., *Toledo*, *supra*, 26 Cal.4th at pp. 227-228.) In fact, the intent element of the crime is the only one defendant did not challenge in his briefs on this appeal. While discussing other elements, he asserts he only intended to find out if

the police were looking for him when he made the problematic phone call. This purpose, however, only speaks to why defendant dialed the victim's number; it has nothing to do with why he told her not to be surprised if something happened to her or if her "cars blow up." For these reasons, *Elonis* has no bearing on the validity of defendant's conviction.

In reviewing defendant's claim that proof of an essential element was lacking at trial, "we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Davis* (1995) 10 Cal.4th 463, 509, emphasis in original.) In the course of this inquiry, we " ' "presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*Ibid.*)

a. Defendant's statements threatened death or great bodily injury to the victim

As indicated *ante*, defendant called the victim the day after he broke her nose, asked if the police were after him, told the victim she was "dead to" him, and then said, "Don't be surprised if something happens to you or if your cars blow up." He contends these statements are too ambiguous to actually threaten great bodily injury or death. We disagree.

"A criminal threat is the communication of an intent to inflict death or great bodily injury on another . . . ." (*People v. Maciel* (2003) 113 Cal.App.4th 679, 683.) A threat need not be accompanied by a description of specific steps that the speaker will take to

carry it out, and even language that is ambiguous may constitute a criminal threat if the surrounding circumstances support such a conclusion. (*People v. Butler* (2000) 85 Cal.App.4th 745, 752-753.) Moreover, when deciding whether the words that were spoken constitute a threat of death or great bodily injury, a court is to consider " 'the circumstances under which the threat is made' " and not just the words themselves. (*People v. Culbert* (2013) 218 Cal.App.4th 184, 190; see *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218 [circumstances surrounding threat are relevant to first element as well as to third, in the context of which they are most typically discussed].)

The statements defendant made to the victim in this case easily meet the standard for constituting a criminal threat. First, defendant's statement that the victim was "dead to" him added context to his more ambiguous claims that "something" would happen or that the victim's cars might "blow up." Second, defendant made these statements only a day after he hit the victim hard enough to break her nose.[4] Finally, defendant is the same man who had shot at a family member in the victim's presence and in front of the family residence in 2008. Because of this history, the victim could reasonably have concluded that defendant was threatening to kill or cause great bodily injury to the victim when he

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[4] The jury's inability to reach a unanimous verdict on the spousal battery count does not mean it found defendant did not break the victim's nose by hitting her in the face. As we indicated *ante*, the jury received instructions that defendant should not be convicted if he acted in self-defense. Because we must presume every fact that supports the judgment (*People v. Davis*, *supra*, 10 Cal.4th 463, 509), and because a finding that defendant injured the victim on the day before the threatening phone call supports the judgment for the reasons we discuss, we presume defendant did in fact break the victim's nose by hitting her on the day before the call.

told her she was "dead to" him and warned that "something" might happen to her or that her cars might "blow up."

Defendant suggests his statement that the victim's cars might "blow up" could not have communicated anything threatening because he suffers from cirrhosis and uses a cane, which implies his words cannot have been threatening. The evidence shows, however, that defendant walked without a cane on the night before the threatening phone call. Moreover, that defendant broke the victim's nose on the night before the call indicates he in fact had enough strength and dexterity to cause serious harm.

Similarly, defendant proposes that he could have meant only that the victim's cars might "blow up" because of a lack of engine oil. He also asserts he could only make a car "blow up" if he had experience in bomb disposal. As defendant views the facts, his words were "rude and intemperate" but not actually threatening. It is irrelevant that the jury could have interpreted defendant's statements to the victim on the phone in a relatively innocent way. As we just explained, the history between defendant and the victim means that substantial evidence supports the jury's contrary conclusion that defendant's words amounted to a threat to cause death or great bodily injury.[5]

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[5] In the portion of his opening brief that addresses the first element of a criminal threats conviction, defendant relies heavily on *In re Ricky T.* (2001) 87 Cal.App.4th 1132. In that case, however, the appellant conceded that substantial evidence supported the first two elements of his conviction. (*Id. a*t p. 1136 ["Appellant concedes that the evidence supports the first two elements of the offense but argues that there is insufficient evidence to establish that the threat was unequivocal and immediate or that it caused [the victim] to be in sustained fear for his safety"].) Because the *In re Ricky T.* court, by its own words, did not issue any holdings on when a statement meets the first element of a charge under section 422, we postpone our discussion of the case until the next section of this opinion.

Substantial evidence therefore supports the jury's finding that the first essential element of a section 422 charge had been proved.

b. The threat was unequivocal, unconditional, and immediate

Defendant asserts the evidence at trial fails to establish the third element of a section 422 conviction, namely, that he made an unequivocal, unconditional threat that he could immediately carry out against the victim. He queries how a "hobbled, sick, sometimes loveable sometimes not so loveable drunk" could blow up a car or make "something happen[] to" the victim. We again disagree and find sufficient evidence supports this portion of the judgment.

"Section 422 requires that the threat be '*so* unequivocal, unconditional, immediate, and specific [that it] convey . . . a gravity of purpose and an immediate prospect of execution of the threat . . . .' (Italics added.)" (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1137.) Even threats that are somewhat conditional in nature may be punishable under section 422, "if their context reasonably conveys to the victim that they are intended." (*People v. Brooks* (1994) 26 Cal.App.4th 142, 149 [Fourth Dist., Div. Two].) Once again, context is key, and, "The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat." (*Ricky T.*, at p. 1137.) In this inquiry, we focus on the effect the threatening words had on the victim and inquire into the reasonableness of his or her perception of what the speaker intended. (*Brooks*, at p. 148.) Because we discussed the specificity of defendant's words *ante*, we now

consider only the extent to which defendant uttered a threat that was unequivocal, unconditional and immediate.

Defendant insists this case is on all fours with *In re Ricky T.* There, the victim, a teacher, struck the defendant, a 16-year-old student, with a door he was opening. (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1135.) The defendant told the teacher, " 'I'm going to get you.' " (*Ibid*.) Later, the defendant admitted he told the teacher, " 'I'm going to kick your ass.' " (*Id.* at p. 1136.) However, the defendant "did not make a specific threat or further the act of aggression." (*Id.* at p. 1135.) The victim sent the defendant to the school office. The defendant was not interviewed by a police officer until the next day. (*Ibid.*) A week later, the same police officer interviewed the defendant again under *Miranda*.[6] In the second interview, the defendant told the officer that on the day the incident occurred he said to the teacher, " 'I'm going to kick your ass.' " (*Id.* at p. 1136.)

On appeal, the court reversed a conviction under section 422. (*In re Ricky T.*, *supra*, 87 Cal.App.4th at pp. 1135, 1141.) It accused the People of "rel[ying] too much on judging a threat solely on the words spoken" and noted the police were not called until the following day. (*Id.* at p. 1138.) This indicated the threat was not truly "immediate." (*Ibid.*) The court also emphasized "there was no evidence in this case to suggest that [the defendant] and [the teacher] had any prior history of disagreements, or that either had previously quarreled, or addressed contentious, hostile, or offensive remarks to the

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

other." (*Ibid.*) The evidence also failed to show that the defendant had been physically aggressive during the threat. (*Ibid.*) Therefore, the defendant's words may have been "intemperate, rude, and insolent," but they "hardly suggest[ed] any gravity of purpose." (*Ibid.*) However, before the discussion we just summarized, the *In re Ricky T.* court noted it was reversing the judgment "[b]ecause of the paucity of facts in the two police reports."[7] (*Id.* at p. 1135.)

In re Ricky T. is readily distinguishable. First, in this case, the trial court received evidence from live witnesses who testified in detail about the complicated relationship between defendant and the victim. They fought "often." For example, testimony showed that, in 2008, defendant fired shots at the victim's home. At the preliminary hearing, the victim spontaneously volunteered this event as a reason she was afraid. Although she denied this fact at trial, the jury received the entire transcript of the preliminary hearing. It also saw the victim recant her testimony from the preliminary hearing and heard comments from an officer who investigated the 2008 shooting that the victim and the daughter who testified at trial had minimized the event. In addition, defendant had been drinking before both the 2008 shooting and the 2011 incident that caused the victim's broken nose. Evidence he had previously acted out violently after consuming alcohol helps support a conclusion that defendant was unequivocally and unconditionally threatening to actually cause the victim to suffer death or great bodily injury. Finally, it

[7] The parties had "stipulated that the matter be submitted on two police reports." (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1135.)

bears repeating that the phone call from defendant occurred only a day after he broke the victim's nose.

In short, the jury received substantial evidence that defendant and the victim had a relationship marked by frequent fighting that turned violent on multiple occasions. *In re Ricky T.* is distinguishable on this ground because it involved a student and a teacher with no history of disagreements. Against the backdrop of their lengthy and tumultuous relationship, defendant's statements to the victim on the telephone were sufficiently unequivocal. Earlier violent encounters proved to the victim that defendant was prone to committing acts of domestic violence and provided details about the types of things he might do.

In the section of his briefs devoted to the third element of a section 422 charge, defendant again characterizes himself as "hobbled" and emphasizes that he uses a cane. We understand this as a contention that his statements must have been conditional or equivocal because he could not actually carry out any of the things he threatened. Again, however, the jury received evidence that defendant walked without a cane on the night before the threatening phone call. There is no support for defendant's starting premise, namely, that at the time of the threat he could not walk well enough to do any damage to the victim. Moreover, defendant demonstrated on the night before the phone call that he had the physical capacity to break the victim's nose. This evidence supports a finding that defendant's statements were unequivocal and unconditional.

Defendant also insists that he was just " 'spouting off' in the heat of the moment at his wife of over 30 years." What he omits is that in those 30 years of marriage his wife experienced domestic violence that lent "gravity of purpose" to defendant's statements over the phone. (*In re Ricky T.*, *supra*, 87 Cal.App.4th at p. 1136.)

Similarly, defendant insists the "whole purpose of the call" was to ascertain whether the police were looking for him, not to threaten. "To be sure, defendant offered explanations for some of the[] circumstances [surrounding the call], but the jurors did not have to believe them." (*People v. Dowl* (2013) 57 Cal.4th 1079, 1092.) The evidence we discussed *ante* gave the jury sound reasons to reject defendant's characterization of his own behavior and find he made a threat that was sufficiently unequivocal, unconditional, and immediate.

c. The victim was in sustained and reasonable fear because of the threat

The remaining elements of defendant's conviction for criminal threats are that the victim was in sustained fear and that her fear was reasonable. (*Toledo*, *supra*, 26 Cal.4th 221, 227-228.) Because these criteria cover closely related topics, we consider them together. Defendant asserts no evidence at trial showed that the victim experienced fear that was sustained. Even if she did, he contends her fear was unreasonable because, "She had lived with this man for 30 some [*sic*] years and he was living under her roof despite their differences and their separation." We disagree with both of these premises.

"[T]he term 'sustained fear' is defined . . . [citation] as a period of time 'that extends beyond what is momentary, fleeting, or transitory.' " (*In re Ricky T.*, *supra*, 87

Cal.App.4th at p. 1140.) The time fear lasts is not necessarily the time a threat lasts, as fear is a state of mind in a victim that lingers after the threat takes place. (*People v. Fierro* (2010) 180 Cal.App.4th 1342, 1348-1349 (*Fierro*).) Courts have not established a minimum length of time fear must last in order to qualify as sustained. (See *People v. Allen* (1995) 33 Cal.App.4th 1149, 1156, fn. 6 (*Allen*) [analogizing to element of premeditation and deliberation required for homicide, or to the special circumstance of killing while lying in wait].) Fifteen minutes of fear were sufficient in a case involving "a defendant who is armed, mobile, and at large, and who has threatened to kill the victim and her daughter." (*Id.* at p. 1156.) In a case involving a defendant who brandished a weapon while threatening to kill the victim, the court held that 15 minutes of fear was enough to support a conviction but noted in dictum that a single minute of fear would have sufficed. (*Fierro*, *supra*, 180 Cal.App.4th at p. 1349.) As is also true with the essential elements we have already discussed, "The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear." (*Allen*, at p. 1156.)

At trial in this case, the victim testified that the telephone call caused her or someone close to her to call the police. She admitted the 2008 shooting incident caused her to be afraid of defendant. The victim then left her home and stayed with family members "as a safety precaution." She did not return home until she heard defendant had been arrested. Since the arrest did not occur until January 3, 2012, or five days after the threatening phone call, a reasonable jury could conclude the victim's fear lasted at least

that long. In addition, we have already explained that the relationship between defendant and the victim was characterized by frequent fighting, sometimes including violence. This history could have caused the victim to experience reasonable fear that she was in danger as long as defendant was out of custody. For these reasons, substantial evidence supports the element of sustained fear.

Defendant makes much of testimony the victim gave at the preliminary hearing. After eliciting answers to questions about defendant's statements to the victim on the phone, the prosecutor asked, "Were you afraid [defendant] might injure you or kill you based on those threats?" Defense counsel objected that the question was leading, and the trial court sustained the objection. It told the witness she did not need to answer the question, but she had already done so. However, the response was never stricken from the record. The victim's answer was: "Uhm, I would like to say no."

According to defendant, "No rational juror could have convicted of [*sic*] criminal threats after that testimony." We disagree, as we have no idea how the victim intended to finish her statement. Defendant assumes she meant she was not afraid of injury or death, but the record equally supports the conclusion that the entire message she meant to convey was something like, "I would like to say no, but I must say yes because of the violence defendant has previously exhibited." In her response to the next question, the victim stated the threats left her "in fear for [her] safety." In addition, when asked if defendant had been violent with her in the past, the victim immediately volunteered that

"he shot [her] house up." In sum, the victim's testimony that she would like to say she was not afraid defendant would kill or injure her is not dispositive, as defendant claims.

Defendant also contends any fear the victim might have had because of defendant's statements to the victim on the phone was unreasonable. He points to the facts that he and the victim had been married for over 30 years, that she still had feelings for him, and that she had been visiting him in custody in the months before trial. Defendant also notes no one remembered what caused the fight by the time of trial. At no point, however, does defendant account for or even acknowledge the victim's nervousness about testifying, her change in testimony after she began visiting him in custody, or the internal inconsistencies present even in her trial testimony. He in essence asks us to seize upon the trial testimony that helps him while ignoring the victim's testimony from the preliminary hearing or other trial testimony that best supports the verdict. Published California authority notes domestic violence is often underreported; even when it is reported, victims often recant. (*People v. Brown* (2004) 33 Cal.4th 892, 898-899.) Defendant cites no authority demonstrating that the victim could not be afraid of him because they had been married for years, or because she still had feelings for him. If anything, the years of fighting may have given the victim an increased reason for fear, because she could assume there would be no change in the tension and acts of violence of the type she had already experienced. That the victim had been visiting defendant does not reduce the reasonableness of her fear at the time of the threats, because he could not strike or attack her while behind bars. The lack of recall of what started the 2011 fight is

similarly irrelevant. Given the history between defendant and the victim, substantial evidence supports the finding that the victim's sustained fear was reasonable.

d. The trial court was not obligated to instruct the jury on a lesser included offense

Defendant argues the trial court was obligated to instruct the jury on the lesser included offense of attempted criminal threats. He concedes there was substantial evidence of an attempted threat but contends no evidence supported a finding that the victim was reasonably in sustained fear. More specifically, he argues "the evidence permitted a reasonable doubt as to whether [the victim], married to [defendant] for over 30 years, knowing his weakness when drinking, fearless enough to take him into her house even when they were separated, was actually in sustained fear." We are again unpersuaded.

" '[W]hen the evidence raises a question as to whether all of the elements of the charged offense were present' " but the evidence demonstrates that the defendant may be guilty of a lesser included offense, the trial court has a duty to instruct the jury on that lesser included offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) However, no such duty arises " 'when there is no evidence that the offense was less than that charged.' " (*Ibid.*) We independently review claims that a trial court erroneously failed to instruct on a lesser included offense. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218.) In the course of this inquiry, we defer to the jury assessments about credibility. (*Breverman*, at p. 162.)

Attempting criminal threats is a lesser included offense of making criminal threats because "California appellate courts have repeatedly accepted the principle that attempt is a lesser included offense of any completed crime." (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 609.) More specific to this case, a defendant may be convicted of attempting criminal threats if he or she has the requisite intention and "performs an act that goes beyond mere preparation and indicates that he or she is putting a plan into action." (*Toledo, supra*, 26 Cal.4th at p. 230.) One of the examples the *Toledo* court gave of how a criminal threat may be attempted but not successfully made occurs when the defendant intends his or her statement to be understood as a threat, but the statement "does not *actually* cause the threatened person to be in sustained fear for his or her safety even though . . . that person reasonably could have been placed in such fear." (*Toledo*, at p. 231.)

We have already explained why substantial evidence supports a finding that the victim was in sustained fear. When arguing instructional error, defendant simply repeats the reasons he gave when contending the evidence fails to support a finding the victim's fear was sustained. He places too much emphasis on the victim's statement that she would like to say she was not afraid of injury or death after the threatening phone call. Defendant also insists the only evidence the victim's fear was sustained is her testimony that she was afraid, without reference to how long the fear lasted. This ignores the evidence that the victim vacated her own residence until defendant's arrest. Because defendant points to no evidence showing why he cannot be guilty of a completed criminal

threat and instead asks us to reweigh the evidence we already discussed in a way that makes him liable only for attempting to make a criminal threat, the trial court did not have a duty to instruct the jury on the lesser included offense.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.